82 No. 174

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

H. S. CROCKER COMPANY, INC.,
Petitioner,

vs.

FRANK J. OSTROVE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does an employee who alleges wrongful discharge as a means of effectuating an alleged price-fixing conspiracy have standing to bring a private antitrust treble damage action against his employer under Section 4 of the Clayton Act?

2. Does every alleged price-fixing conspiracy inherently include a subsidiary conspiracy to boycott non-cooperating employees, so that, based solely on evidence of possible price-fixing, a former employee may automatically maintain an action for conspiracy to boycott his services under Section 4 of the Clayton Act without presenting any evidence to rebut his employer's showing, on motion for summary judgment, that (i) the employee resigned despite the employer's request that he stay, (ii) the employee was not interested in and never sought further employment in the industry in question, and (iii) no agreement to boycott the employee ever existed?

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions below	1
Jurisdiction	1
Provisions of law involved	2
Statement of the case	3
(a) Factual background	3
(b) The three district court decisions	4
(c) The Ninth Circuit decision	7
Reasons for granting the writ	9
I	
The Court of Appeals Decision Is in Direct Conflict with Standing Decisions of the Courts of Appeals in Other Circuits	14
II	
McCready Did Not Decide the Limits of Antitrust Standing; this Case Presents the Perfect Opportunity To Do So	19
III	
The Court of Appeals Decision Impermissibly Uses an Inference of Conspiracy, in Lieu of Evidence, to Reverse a Proper Grant of Summary Judgment	23
Conclusion	28

TABLE OF AUTHORITIES CITED

Cases

Page

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 26

Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981) 11, n.25

Bichan v. Chemetron Corp., ... F.2d ....., 1982-2 CCH Trade Cases ¶ 64,807 (7th Cir. 1982), affirming Bichan v. Chemetron Corp., 1981-2 CCH Trade Cases ¶ 64,293 (N.D. Ill. 1981) 10, 11, 14, 15, 16, 18, 21, n.44; 22, n.46

Blue Shield of Virginia v. McCready, 50 U.S.L.W. 4723 (1982) 12, 19, 20, 21, 22, 23

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 8, 9

Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972) 11, n.24; 19, n.41

Callahan v. Scott Paper Co., No. 81-3786, 43 ATRR 199 (E.D. Pa. 1982) 10, n.20; 14, n.32; 15, n.34

Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952) 4, n.5

Contreras v. Grower Shipper Vegetable Association of Central California, 484 F.2d 1346 (9th Cir. 1973), cert. denied, 415 U.S. 932 (1974) 4, n.5

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Table of Authorities Cited

Cases

Page

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) 13, 25, 26, 27

Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3d Cir. 1978) 27, n.60

Golf City, Inc. v. Wilson Sporting Goods Co., Inc., 555 F.2d 426 (5th Cir. 1977) 26

Gutierrez v. E & J Gallo Winery Company, 604 F.2d 645 (9th Cir. 1979) 4, n.5

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 9

Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) 26

Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979) 18, n.40

McNulty v. Burden, No. 76-3952, 43 ATRR 10 (E.D. Pa. 1982) 10, n.20; 14, n.32

In Re Multidistrict Vehicle Air Pollution, MDL No. 31, 481 F.2d 122 (9th Cir.), cert. denied sub nom. Morgan v. Automobile Manufacturers Assoc., Inc., 414 U.S. 1045 (1973) 4, n.5

Moore v. Chesapeake & Ohio Railway Co., 340 U.S. 573 (1951) 25, n.56

Natrona Service, Inc. v. Continental Oil Co., 598 F.2d 1294 (10th Cir. 1979) 27, n.60

Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832 (2d Cir. 1980) 27, n.60

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Table of Authorities Cited

Cases

Page

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 24, n.52

Program Engineering, Inc. v. Triangle Publications, Inc., 634 F.2d 1188 (9th Cir. 1980) 4, n.5

Radovich v. National Football League, 352 U.S. 445 (1957) 15-16, n.35

Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), cert. denied, 411 U.S. 938 (1973) 11, n.27

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Theatre Enterprises, Inc. v. Paramount Film Dist. Corp., 346 U.S. 537 (1954) 26

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Page

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Statutes

Clayton Act, Section 4 (15 U.S.C. § 15) ..... passim

28 U.S.C.:

§ 1254(1) 2

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§ 1294 2

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Federal Rules of Civil Procedure, Rule 56 ..... 2, 24, 26

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Areeda and Turner, *Antitrust Law* ¶¶ 334-341 (1978) 12, n.29

Antitrust and Trade Regulation Report, Volume 43, No. 1073, July 15, 1982 ..... 10, n.19

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Petitioner,

VS.

FRANK J. OSTROFE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed on March 8, 1982.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals, reported at 670 F.2d 1378 and at 1982-1 *Trade Cases* ¶ 64,643, are set out in Appendix A to this Petition. The prior 1977, 1975, and 1974 decisions of the district court are unreported, and appear in Appendix B, Appendix C, and Appendix D, respectively.

JURISDICTION

The judgment of the Court of Appeals was filed on March 8, 1982. A timely petition for rehearing with suggestion for rehearing en banc was denied on May 6, 1982,

following a vote of the court on the suggestion for rehearing en banc. The court's denial appears in Appendix E. On May 13, 1982, the Court of Appeals stayed its mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, pending the filing of this petition for a writ of certiorari; thereafter the court extended the stay of mandate to August 4, 1982.

This court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291 and 1294. Jurisdiction was asserted in the district court under 28 U.S.C. § 1337 and § 4 of the Clayton Act (15 U.S.C. § 15).

PROVISIONS OF LAW INVOLVED

Clayton Act, Section 4 (Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U.S.C. § 15):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Rule 56, Federal Rules of Civil Procedure. Summary Judgment:

> . . . .
>
> (e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or

further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

. . . .

STATEMENT OF THE CASE

(a) Factual Background

Petitioner H. S. Crocker Company, Inc. ("Crocker") is a manufacturer of lithograph paper labels. Respondent Frank J. Ostrofe is a former employee of petitioner. In July 1970, respondent resigned from his sales position with Crocker to embark upon a career as a stockbroker. Following his resignation, respondent never applied for reemployment with Crocker and, as respondent has conceded throughout these proceedings, was not interested in applying and did not apply for a job with any other label manufacturer.[1]

In January 1974, three and one-half years after his resignation from Crocker, respondent filed this private antitrust action under Section 4 of the Clayton Act (15 U.S.C. § 15), alleging that Crocker and other unnamed paper label manufacturers were engaged in a conspiracy to fix prices and allocate customers of paper labels, that the alleged conspiracy included an agreement to boycott those persons, including respondent, who interfered or threatened to interfere with the alleged conspiracy, and that respondent was forced to resign his position as a result of the alleged conspiracy.

The first of these allegations was not new. Prior to the filing of this suit, a national class action had been filed against Crocker and other defendants by label customers,

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[1] *See* Appendix B at 7-14; Appendix C at 9.

the alleged objects of the price-fixing conspiracy, and had been settled by Crocker.[2] In addition, the Department of Justice had conducted an antitrust investigation of the label industry, and in March 1974 filed both civil and criminal antitrust actions against Crocker.[3] Thus, excluding this action, Crocker already has been subject to criminal and civil government actions, a national class action by customers, and a separate civil action by a single customer[4] with respect to the price-fixing and customer allocation charges alleged by respondent.

(b) The Three District Court Decisions

In April 1974, Crocker moved to dismiss the complaint on the ground that respondent lacked standing to sue under the well-established "target area" test of antitrust standing.[5] On December 4, 1974, the trial court ruled that re-

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[2]*Sun Garden Packing v. International Paper Co. et al.*, C72-592 CBR filed on March 31, 1972, Judgment of Dismissal by settlement filed on May 10, 1973.

[3]*U.S. v. H. S. Crocker* (criminal), Cr. 74 182 CBR; *U.S. v. H. S. Crocker*, Criminal Petition C2424-R; *U.S. v. H. S. Crocker*, Civil No. C74-0560 CBR, all filed March 12, 1974.

[4]The single customer action, *Kockos Bros. Inc. v. H. S. Crocker*, C73-1633 WTS, was filed in 1973, before the filing of this action, and subsequently was settled by Crocker.

[5]Until its decision in this case, the Ninth Circuit had consistently adhered to the "target area" test for standing to sue under Section 4 of the Clayton Act and had denied standing to persons such as employees not within the area of the economy endangered by the breakdown of competitive conditions. *See, e.g., Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188 (9th Cir. 1980); *Gutierrez v. E & J Gallo Winery Company*, 604 F.2d 645 (9th Cir. 1979); *Solinger v. A & M Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979); *Contreras v. Grower Shipper Vegetable Association of Central California*, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *In Re Multidistrict Vehicle Air Pollution, MDL No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied sub nom. Morgan v. Automobile Manufacturers Assoc., Inc.*, 414 U.S. 1045 (1973); *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

spondent indeed lacked standing to sue because, as an employee, he was not in the target area of the alleged conspiracy to fix prices and allocate customers of paper labels.[6] Nevertheless, the court held that insofar as the complaint alleged a conspiracy to boycott employees who interfered with the alleged price-fixing conspiracy, the alleged boycott could be considered a separate conspiracy which respondent had standing to challenge. In light of the boycott allegations, therefore, the court denied the motion to dismiss, "without prejudice, however, to a properly documented motion for summary judgment. . . ."[7]

Thereafter, Crocker propounded a brief set of interrogatories to respondent concerning the alleged boycott. In response to these interrogatories, respondent conceded that he had not applied for employment with *any* label manufacturer following his resignation from Crocker. On the basis of this concession, Crocker moved, in June 1975, for summary judgment on the ground that respondent's failure to demand employment barred his boycott claim as a matter of law. On August 29, 1975, during the pendency of Crocker's motion for summary judgment, respondent belatedly moved for leave to amend his complaint to allege, in substance, that Crocker's alleged termination of respondent was a unilateral refusal to deal in furtherance of the alleged price-fixing conspiracy.

The district court disposed of both motions in its Memorandum of Decision dated December 2, 1975.[8] The court denied Crocker's motion for summary judgment because, on the record then before it, there remained a factual issue as to whether it would have been futile for respondent to apply for employment.[9] The court also denied respondent's motion to amend the complaint, holding that respondent's

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[6]Appendix D at 3-9.

[7]*Id.* at 12.

[8]Appendix C.

[9]*Id.* at 9-20.

"unilateral refusal to deal" theory could not permit him to do indirectly that which he had no standing to do directly, namely, complain of the alleged price-fixing conspiracy.[10]

Crocker then engaged in discovery to determine whether there was any factual basis for respondent's claim that it would have been futile to demand employment and, more importantly, whether there was any factual evidence of the alleged boycott itself. To this end, Crocker took the depositions of executives at three nationally known label manufacturers identified by respondent as having been participants in the alleged price-fixing conspiracy and boycott conspiracy. In the course of these depositions, *which respondent failed to attend,* each of the executives stated that he had never discussed respondent's employment with anyone in the label manufacturing industry; that he had never agreed in any way to boycott respondent or to prevent respondent from being employed in the industry; that he had no reason to believe that any conspiracy to boycott respondent existed; and that had respondent applied for a job with his company, respondent's application would have received the same consideration as that accorded any other applicant. Meanwhile, respondent's own discovery efforts were virtually nonexistent.[11]

In September 1977, three and one-half years after the filing of the complaint and almost two years after disposition of the prior summary judgment motion, Crocker filed a second motion for summary judgment based upon the total absence from the record of any evidence that a boy-

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[10] *Id.* at 4-9.

[11] Apart from initial discovery filed simultaneously with the complaint, respondent's entire discovery efforts consisted of a single two-page set of interrogatories seeking information about Crocker's gross sales, profits and salary levels. During the entire pendency of this action, respondent did not take a single deposition or make any other effort to bring this case to trial or to attempt to develop any factual support for his claims.

cott existed, or that it would have been futile for respondent to demand employment with Crocker or with any other label manufacturer. Respondent replied with only a four-page memorandum in opposition to the motion.[11] In light of respondent's failure to provide any evidence of the alleged boycott, District Court Judge Cecil Poole granted summary judgment for Crocker on October 7, 1977.[12]

(c) The Ninth Circuit Decision

On March 8, 1982, approximately two years after oral argument, a divided panel of the Ninth Circuit reversed the district court's rulings on the motions to dismiss, to amend the complaint, and for summary judgment. In an opinion written by Chief Judge Browning, the majority held that a discharged employee has standing under Section 4 to challenge an alleged price-fixing conspiracy involving his former employer. Expressly abandoning prior precedents, the majority held that antitrust standing should be determined by "a balancing of competing policy interests, principally the interest in effective enforcement of the antitrust laws against the interest in avoiding vexatious

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[11]The majority below erroneously stated in its opinion that respondent offered "affidavits" in support of his allegations. The accurate facts are that respondent filed only *one affidavit* in this case, and that was in 1975; *no* affidavits were offered in 1977.

[12]*See* Appendix B. In the hearing on Crocker's summary judgment, Judge Poole summarized the state of the record as follows:

> "The Court: Can you point to any evidence of intimidation or ostracism or coercion that is alleged to have taken place since the time he voluntarily resigned?
>
> "Mr. Lamont: I suppose that we can't.
>
> . . . .
>
> "The Court: He has not, since that time, made any request to come back in the field, nor is there any evidence in the record that anybody said, 'You can't get back in.'
>
> "Mr. Lamont: That's correct.
>
> "The Court: That's all I have before me."

A complete transcript of the hearing is included in Appendix B.

litigation and excessive liability."[14] The majority expressed the view that its new approach was not contrary to the decision of this Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), because it concluded that *Brunswick* does not limit Section 4 of the Clayton Act to suits for damages flowing from the breakdown of competitive conditions that makes the alleged conduct unlawful.[15]

The majority also held that respondent's evidence of the existence of a price-fixing conspiracy was *per se* sufficient to create a triable factual issue as to whether there existed a subsidiary conspiracy to boycott his services. The majority did not dispute the district court's finding that there was absolutely no evidence of any conspiracy relating to respondent's employment. It concluded, however, that "a trier of fact might reasonably infer from evidence of the existence of [a price-fixing] conspiracy that each of the participating companies had also impliedly agreed . . . that any non-cooperating employee who jeopardized implementation of the conspiracy would be removed from his or her position and would not be rehired."[16]

Judge Kennedy dissented, noting that the effect of the majority's decision is to permit what is essentially a claim for wrongful discharge cognizable under state tort law to be prosecuted as a federal antitrust claim. In Judge Kennedy's view, a discharged employee challenging a price-fixing conspiracy by his former employer does not state a claim for injury by "reason of anything forbidden in the antitrust laws":

> "Here, the main conspiracy alleged as the premise of liability was not one to harm employees. It was one to fix prices and allocate customers in the nationwide market for paper labels. Appellant was not in the area of the economy endangered by the breakdown of

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[14] Appendix A at 11.

[15] *Id.* at 20-24.

[16] *Id.* at 25.

competitive conditions; that is, he was not injured by the labels industry breakdown 'the antitrust laws were intended to prevent,' *Brunswick*, 429 U.S. at 489. It may be true, under appellant's theory, that in a strict causation sense the employee's termination resulted from the conspiracy, but collateral damages to persons outside the competitive area aggrandized by antitrust defendants are inconsistent with the orderly administration of the antitrust laws. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The congressional concern underlying the substantive provisions of the antitrust laws was competition, not employee coercion or discharge. Appellant's intimate relation with the scheme is not sufficient; he must be intimately related to its anticompetitive effect."[17]

Judge Kennedy also dissented from the majority's decision to permit respondent's claim of a subsidiary employee boycott to be brought to trial based on the "inference" that a price-fixing conspiracy inherently includes a conspiracy to boycott non-cooperating employees. Judge Kennedy noted that respondent "resigned voluntarily from the company despite their request for him to stay," and "did not attempt to obtain employment with any other industry employer. . . . The district court properly granted summary judgment on the boycott claim for failure to come forward with evidence to support the charge."[18]

REASONS FOR GRANTING THE WRIT

The unprecedented decision of the Ninth Circuit in this case squarely conflicts with decisions of other Circuits and is contrary to prior decisions of this Court on the important issues of the scope of standing to sue under Section 4 of the Clayton Act and the applicable criteria for granting summary judgment. This Court should grant certiorari to resolve the "growing conflict over the Clayton Act § 4

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[17] *Id.* at 40-41.

[18] *Id.* at 45.

standing of employees" who file antitrust claims to challenge their terminations,[19] to reaffirm the authority of this Court's rulings on the standards for summary judgment, and to prevent this burgeoning class of employee discharge cases from further burdening the federal courts.[20]

The Ninth Circuit's primary holding—that an employee allegedly discharged by his employer pursuant to an alleged price-fixing conspiracy may sue for *antitrust* recovery—is in direct conflict with the recent Seventh Circuit decision in *Bichan v. Chemetron Corp.*, ... F.2d ..... (7th Cir. 1982), decided June 25, 1982, holding that an employee who alleges wrongful discharge and a boycott of his services in furtherance of an alleged price-fixing conspiracy does *not* have standing to bring a private treble damage action against his employer under Section 4.[21] With respect to the holding of the majority below, the Seventh Circuit stated:

> We reject the *Crocker* holding. We believe Judge Kennedy's dissent, maintaining that, under sound anti-

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[19]Antitrust and Trade Regulation Report, Volume 43, No. 1073, July 15, 1982 (Highlights Page).

[20]At least four district court decisions dealing with the issue of employee standing have been handed down since the Ninth Circuit's decision. In two cases, the district court rejected the Ninth Circuit's rationale. *Callahan v. Scott Paper Co.*, No. 81-3786, 43 ATRR 199 (E.D. Pa. 1982), decided June 14, 1982; *Perry v. Hartz Mountain Corp.*, 537 F.Supp. 1387 (S.D. Ind. 1982), decided April 28, 1982. In one, the court expressed a favorable view of the Ninth Circuit's decision but found it contrary to controlling decisions in the Third Circuit and this Court. *McNulty v. Burden*, No. 76-3952, 43 ATRR 10 (E.D. Pa. 1982), decided June 22, 1982. In the fourth, the court held that the employee had standing, although it was uncertain whether he had stated a valid antitrust claim. *Shaw v. Russell Trucking Line, Inc.*, No. 81-1852, 43 ATRR 198 (W.D. Pa. 1982), decided June 30, 1982.

[21]1982-2 CCH Trade Cases ¶64,807. Because the *Bichan* court expressly recognized the conflict between its opinion and that of the majority below, its opinion was circulated among all judges in regular active service on the court, pursuant to Seventh Circuit Rule 16. Slip Opinion at 1.

> trust principles, a marketing director whose injury has nothing to do with the alleged anticompetitive conduct of price fixing has not sustained an "antitrust injury," is the more reasoned analysis, and we adopt it here.
>
> We . . . are convinced that in fashioning the antitrust laws Congress was concerned with competition, not employee coercion or discharge.[23]

The Seventh Circuit's decision in *Bichan* was predicated upon the court's use of the well-established "target area" test of antitrust standing. In contrast, the decision below was predicated upon the majority's explicit rejection of that standard and adoption in its place of an amorphous "public policy" standard which has great potential for encouraging litigation, producing essentially *ad hoc* results, burdening the courts with a myriad of treble-damage suits by parties with at best tangential antitrust injuries, and extending federal antitrust juridiction into areas within the traditional domain of state law. The majority's use of this vague new standard to determine whether respondent would be permitted to seek antitrust relief places the decision below into conflict not just with the Seventh Circuit decision in *Bichan*, but also with decisions in the First,[24] Second,[25] Fifth,[26] Eighth,[27] and Tenth[28] Circuits endorsing the target area approach.

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[23]Slip Opinion at 9.

[24]*See Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 17-19 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980).

[25]*See Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

[26]*See Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1362 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

[27]*See Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 688-89 (8th Cir. 1966) (Blackmun, J.).

[28]*See Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 731-32 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973).

Last Term, in *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723 (1982), this Court indicated its agreement with the trend of decisions in the courts of appeals that persons "tangentially affected" by an antitrust violation—persons whose injuries are "too remote from the violation and the purposes of the antitrust laws"—should not be permitted to maintain a Section 4 action.[18] In light of the facts presented in *McCready*, however, the Court had no occasion to delineate the precise parameters of the "remoteness" doctrine or to resolve the conflict among the circuits as to the correct method of determining which parties or interests are too tangentially affected. *McCready* was a class action suit brought by customers of the alleged conspirators to recover out-of-pocket loss caused directly and immediately by the defendants' refusal to reimburse its insurance customers for certain professional services. *McCready* was not an action by shareholders, corporate officers, creditors, suppliers, subcontractors, or employees—persons whose right to sue by virtue of their relationships with violators have been severely limited by lower court decisions employing the target area test.[19] The present action—a suit by an employee claiming to have been injured by his employer's alleged price-fixing conspiracy and seeking to recover for the alleged loss of employment opportunities in the years following his resignation—squarely presents the issues, left unresolved by *McCready*, of where and how the line should be drawn in defining "remote" antitrust injury.

Equally as troublesome as the novel antitrust standing test adopted by the court below is its ruling reversing the district court's summary judgment against respondent's employee boycott claim. In holding that respondent could proceed on the claim of a subsidiary conspiracy to boycott his employment services—notwithstanding uncontro-

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[18] 50 U.S.L.W. at 4726.

[19] *See generally* Areeda and Turner, *Antitrust Law* ¶¶ 334-341 (1978).

verted evidence that he resigned, he did not seek re-employment, and no boycott actually existed—the court below held that the bare existence of a price-fixing conspiracy, in and of itself, supports the inference of "an understanding that any non-cooperating employee . . . would be removed from his or her position and would not be rehired."[50] If allowed to stand, this ruling would automatically convert every price-fixing or other antitrust conspiracy into a subsidiary conspiracy to boycott allegedly nonsupportive employees.

Thus, even if this Court were to agree with the Seventh Circuit and reject the Ninth Circuit's new antitrust standing doctrine, employees and others with fringe interests in antitrust cases would still be allowed to bring Section 4 actions through the back door by virtue of the Ninth Circuit's inference that all antitrust conspiracies encompass a boycott of non-cooperating employees. Such an inference is contrary to decisions of this Court and other courts of appeals holding that an inference of an antitrust conspiracy must be based, if at all, on evidence of consciously parallel conduct probative of the conspiracy, and that it is impermissible to draw an inference of the existence of one conspiracy based on no evidence other than the existence of an allegedly related conspiracy.[51] Moreover, the court's reliance on such an inference to reverse a grant of summary judgment is contrary to the rule established by this Court in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), that summary judgment is appropriate—indeed, mandatory—where an antitrust plaintiff fails to come forward with a *factual* showing in support of his allegations of an antitrust violation. This Court should not permit this illegitimate means of circumventing the proper limits of antitrust standing.

Crocker respectfully submits that this Court should grant certiorari in this case to resolve the conflict among

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[50]Appendix A at 25.

[51]*See* text accompanying notes 58-59 *infra*.

the Circuits on the proper test for antitrust standing; to provide guidance to lower courts and counsel where the line should be drawn in resolving the question of "remote" antitrust injury; and to prevent the unjustified expansion of treble damage litigation fostered by the Ninth Circuit's unworkable "balancing of policy considerations" test and its unwarranted automatic inference of employee boycott.

I

THE COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH STANDING DECISIONS OF THE COURTS OF APPEALS IN OTHER CIRCUITS

The Seventh Circuit and other courts applying a target area analysis to an allegedly blacklisted employee have found that the employee lacked standing under Section 4 of the Clayton Act,[9] whereas the court below, applying a "public policy" standard created especially for this case, held that respondent could maintain a Section 4 action. Thus, the question squarely presented for resolution by this Court is which of the *clearly conflicting* circuit court approaches should be utilized to differentiate claims remediable under Section 4 from peripheral claims not within the ambit of federal antitrust law.

The leading case employing a target area analysis to an employee claim is *Bichan v. Chemetron Corp.*, ... F.2d ..... (7th Cir. 1982).[10] The plaintiff in *Bichan* was a salaried

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[9] *See, e.g., Bichan v. Chemetron Corp.*, ... F.2d ... (7th Cir. 1982), *affirming Bichan v. Chemetron Corp.*, 1981-2 CCH Trade Cases ¶ 64,293 (N.D. Ill. 1981); *Perry v. Hartz Mountain Corp.*, 537 F.Supp. 1387 (S.D. Ind. 1982). *Cf. McNulty v. Borden*, No. 76-3952, 43 ATRR 10 (E.D. Pa. 1982); *Callahan v. Scott Paper Co.*, No. 81-3786, 43 ATRR 199 (E.D. Pa. 1982).

[10] 1982-2 CCH Trade Cases ¶ 64,807. Prior to the Seventh Circuit decision in *Bichan*, a district court within that circuit had similarly decided not to follow the decision below. *See Perry v. Hartz Mountain Corp.*, 537 F.Supp. 1387 (S.D. Ind. 1982), in which the court stated: "[A]s Judge Kennedy's strong dissent notes, the *Ostrofe* decision is a striking departure from established precedent in its own,

executive allegedly terminated from his position as president of Chemetron's Industrial Gas Division and thereafter blacklisted by the industrial gas industry because of his refusal to adhere to an alleged conspiracy by his employer and its competitors to fix prices, allocate customers, and impose illegal sale conditions on customers. The plaintiff employee argued that having lost salary and bonuses as a direct result of his refusal to participate in the alleged conspiracy, he had suffered an antitrust injury within the meaning of Section 4 of the Clayton Act. The Seventh Circuit, expressly rejecting the analysis and reasoning of the Ninth Circuit in *this* case, held that the plaintiff could *not* maintain the action because he was *not within the target area* of the alleged anticompetitive conduct—the industrial gas market as opposed to the labor market—and had *not* alleged an *antitrust* injury of the type the antitrust laws were intended to prevent.[34]

In sharp contrast to the Seventh Circuit decision, the court below held that respondent had alleged an "antitrust injury" and could maintain a Section 4 action because his alleged injury was "within the core of Congressional concern underlying the substantive provisions of the antitrust laws allegedly violated."[35] The *Bichan* court rejected this

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and this circuit. Without an indication that the Seventh Circuit would join in this departure, this Court will not presume to alter this circuit's settled approach." *Perry* holds that a *state* suit for wrongful discharge, not federal or state antitrust violations, is the proper avenue of pursuit for an employee claiming discharge for refusal to engage in business practices violative of federal antitrust law.

[34]The district court for the Eastern District of Pennsylvania has similarly rejected the analysis below, stating "[it is] manifest that the antitrust laws were not designed to protect [employees] from the type of injury for which compensation is sought here." *Callahan v. Scott Paper Co.*, No. 81-3786, 43 ATRR 199 (E.D. Pa. 1982).

[35]Appendix A at 22. The majority below relied in part upon *Radovich v. National Football League*, 352 U.S. 445 (1957), for its holding that respondent had standing to challenge the alleged

conclusion as well as the policy rationale upon which it was based:

> [W]e are convinced that in fashioning the antitrust laws Congress was concerned with competition, not employee coercion or discharge. . . .
>
> We decline to usurp the legislative role and rewrite the treble damages provision to extend antitrust protection beyond that dictated by established precedent and Congressional intent. . . .
>
> [W]e do not believe Bichan is the proper party to bring a treble damages action because his injury is simply too remote from the alleged illegal conduct. . . .
>
> While Bichan may seek to vindicate his interests in the state courts, he may not maintain a § 4 treble damages action in federal court.[36]

The Seventh Circuit's approach to assessing which alleged injuries are too remote to justify antitrust standing is, Crocker submits, the correct one.[37] The vague standard

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price-fixing conspiracy even though his alleged injury, as impliedly acknowledged by the majority, "did *not* result from the restraint on competition that was the principal object of the conspiracy." Appendix A at 8. According to the majority, "[t]he present case is indistinguishable from *Radovich*." *Id.* at 9. The majority's reliance upon *Radovich*, however, was misplaced. The central purpose of the alleged conspiracy in *Radovich* was to prevent *the free interchange of employees* in the football industry, whereas the conspiracy alleged by respondent sought to restrain competition *among label manufacturers*. The allegation of blacklisting in *Radovich* does not support respondent's standing to sue herein because *Radovich* involved a clearly defined *group boycott aimed at employees*, whereas the employment market was *not the target* of Crocker's alleged price-fixing. The majority's reliance on *Radovich* in the decision below poses yet another conflict with the Seventh Circuit decision in *Bichan*, which expressly rejected the argument that *Radovich* supports respondent's position. Slip Opinion at 6-7.

[36]Slip Opinion at 9-11.

[37]The target area approach taken by the Seventh Circuit in *Bichan* is the same approach taken by the First, Second, Fifth, Eighth, and Tenth Circuits to determine whether a plaintiff who alleges an

adopted by the Ninth Circuit majority below is not based on the statutory language of Section 4, and has great potential for unreasonably expanding federal antitrust jurisdiction into the law of employer-employee relations, and wrongly encouraging costly antitrust litigation by fringe litigants lured by the potential of treble damages and attorney's fees awards. The competing policy interests cited by the panel majority to be balanced—"the interests in effective enforcement of the antitrust laws [and] the interests in avoiding vexatious litigation and excessive liability"—are of little guidance to trial courts who are mandated by Section 4 to determine whether the plaintiff has alleged injury "by reason of" something forbidden in the antitrust laws. In sharp contrast to the clearly defined and concrete factors utilized by the majority of circuits to determine antitrust standing—including assessment of the market in which the defendant operates, the nature of the anticompetitive conduct complained of, the market in which that conduct is directed to impair competitive conditions, and the nature of the injury suffered by actors within that market—the policy interests which the majority suggests balancing are impossible of consistent application, and accord potential litigants no reasonable basis for predicting the applicability of Section 4. The result is a chimera rather than a test; a standard without standards.

The inherent fallibility of the panel majority's *ad hoc* balancing approach is demonstrated by its own analysis in this case. The majority asserted effective enforcement, deterrence, and the need to provide a meaningful remedy as grounds for granting respondent standing. Yet the record herein reveals that respondent waited three and one-half years to file suit, demonstrating not an attempt by respondent to enforce the antitrust laws or deter Crocker

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injury peripheral to an antitrust violation will be permitted to seek antitrust recovery. *See* notes 23-27 *supra*. The rejection by the majority below of the target area test thus places the decision below into conflict with decisions in those circuits as well.

from further allegedly illegal activities, but rather an attempt to jump on the "antitrust bandwagon" two years after customers had already brought suit in a national class action.[38] This case presents exactly the situation of multiple lawsuits against the same defendant that the target area rule was designed to prevent, a situation which the majority's *ad hoc* approach fails to rectify.

Moreover, respondent's alleged injury was not without remedy, as respondent had available a perfectly adequate *tort* remedy under state law for compensatory and punitive damages for wrongful discharge, a remedy which other courts have characterized as the *proper* avenue of pursuit for an employee claiming wrongful discharge for a refusal to engage in business practices violative of federal antitrust law.[39] The expansion of federal antitrust jurisdiction contained in the majority approach thus undermines the concept of federalism by turning the federal antitrust laws into a tort remedy for injury of a kind traditionally dealt with by state law.[40] Such an intrusion into the domain of state law should be impermissible absent full considera-

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[38]*See* note 2 and accompanying text *supra*.

[39]*See, e.g., Tameny v. Atlantic Richfield Company*, 27 Cal.3d 167 (1980); *Bichan v. Chemetron Corp.*, Slip Opinion at 11; *Perry v. Hartz Mountain Corp.*, note 33 *supra*.

[40]Numerous courts have recognized that not all business wrongs are within the reach of the antitrust laws. *See, e.g., Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 289 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979) (unilateral conduct designed to combat competitive inroads into manufacturer's servicing business held to be at best a garden variety business tort reachable under state law, not one cognizable under § 1 of the Sherman Act); *George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 560 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) (numerous policy reasons compel restraint against extending *per se* classification to the kinds of competitive business torts traditionally dealt with by state law); *Kestenbaum v. Falstaff Brewing Corp.*, 575 F. 2d 564, 570-71 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) (the Sherman Act is not the panacea for all b[illegible] affronts; its purpose is to remedy public injury, or injury to competition, as distinguished from private injury).

tion by this Court of the implications and ramifications of the expansion.

This Court should grant certiorari to resolve this conflict among the circuit courts, to preclude further use of federal antitrust law as a remedy for common business affronts reachable under state tort law, and to prevent "enlargement of the [Section 4] weapon to a caliber far exceeding that contemplated by Congress."[41]

II

McCREADY DID NOT DECIDE THE LIMITS OF ANTITRUST STANDING; THIS CASE PRESENTS THE PERFECT OPPORTUNITY TO DO SO

In *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723 (1982), this Court reviewed its prior standing decisions and reaffirmed its earlier conclusions that the potency of the antitrust remedy implies the need for care in the application of Section 4 of the Clayton Act. Stating "[i]t is reasonable to assume that Congress did not intend to allow every person *tangentially affected* by an antitrust violation to maintain an action to recover threefold damages," the Court held that where the threat of duplicative recovery is not involved, the proper focus of inquiry for determining whether a plaintiff lacks antitrust standing is whether the plaintiff's alleged injury is "too *remote* from the violation and the *purposes* of the antitrust laws to form the predicate for a suit under § 4."[42] Because *McCready* involved suit by an economically injured consumer clearly within the area of the economy endangered by the breakdown of competitive conditions, the Court had no occasion to analyze which types of relationships or injuries will not give rise to an antitrust action despite an apparent connection with an alleged antitrust violation. This case presents the Court with such an opportunity.

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[41] *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d at 1295.

[42] 50 U.S.L.W. at 4726 (emphasis added).

The concerns which led the Court to grant McCready standing have no application to the facts of this case, and demonstrate why this case would be an appropriate one to pair with *McCready* to define the line that separates "tangentially affected" persons from those permitted to sue under Section 4. The first concern expressed by the Court was that there be a clear economic nexus between the alleged violation and the harm to plaintiff. McCready, a consumer of unreimbursed psychotherapeutic services, clearly demonstrated such a nexus by alleging a direct out-of-pocket loss suffered as of the moment Blue Shield's alleged antitrust conspiracy impacted her. Her loss was ascertainable "to the penny," and was "so integral an aspect of the conspiracy alleged" as to be "*precisely* 'the type of loss that the claimed violations . . . would be likely to cause.' "[13] In contrast, respondent's claim rests not on any tangible economic injury suffered at the time he chose to change occupations and become a stockbroker, but on the speculative damage theory that, as time progressed, he would have *earned more* had he remained employed in the label manufacturing industry. Crocker submits that such a loss is not of the type illegal price-fixing, bid-rigging, or customer allocation conspiracies are likely to cause, and that recovery under such a damage theory would be entirely fortuitous, depending not on the concrete economic impact of an alleged antitrust violation, but on the chance that the plaintiff would not be successful in his new *chosen* endeavors.

The second concern expressed by this Court in *McCready* was that the alleged injury reflect Congress' "core concerns" in prohibiting the antitrust conduct. As applied to this case, the question would be whether the injury alleged by respondent—loss of employment opportunities—reflects Congress' motivation when it chose to prohibit price-fixing,

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[13] *Id.* at 4725 n. 11 and 4728 (emphasis added).

bid-rigging, and customer allocation conspiracies. Clearly it does not."

In *McCready*, Blue Shield's alleged anticompetitive scheme was condemned because it restrained competition in the market for psychotherapeutic services. As a customer in that market, McCready suffered direct out-of-pocket loss by reason of the alleged restraints placed by Blue Shield on reimbursement. In turn, Blue Shield profited directly by its refusal to reimburse McCready for the psychotherapy she received. McCready's resultant injury (an increase in the net cost to her of the psychotherapeutic services of her choice) thus directly reflected the *reason* Blue Shield's conduct was unlawful. Price-fixing and customer-allocation conspiracies are condemned because they artificially force *customers* to pay higher prices than would be found in a competitive market, and because they reduce the ability of non-conspiring *competitors* to compete in a free market. Were respondent a customer of paper lithograph labels forced by Crocker's alleged price-fixing conspiracy to pay higher prices, his injury clearly would reflect Congress' concern over the breakdown of competitive market conditions. Similarly, were respondent a non-conspiring competitor injured in his ability to compete, respondent would be able to demonstrate an injury flowing from "that which is unlawful in the defendant's conduct."[9] But respondent is neither an economically injured customer nor a competitor

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[8]This fact was recognized by the Seventh Circuit in *Bichan*, Slip Opinion at 9, and by Judge Kennedy below: "The congressional concern underlying the substantive provisions of the antitrust laws was competition, not employee coercion or discharge." Appendix A at 41.

[9]In footnote 19 of *McCready*, the Court affirmed "that the relationship between the claimed injury and that which is unlawful in the defendant's conduct . . . is [a] factor to be considered in determining the redressability of a particular form of injury under § 4." 50 U.S.L.W. at 4727 n. 19.

of Crocker.[46] He is simply an *employee* who allegedly chose to change occupations rather than participate in his employer's claimed illegal conduct, and who took no demonstrable steps thereafter to seek further employment in the industry.

To deny antitrust standing to persons in respondent's position would not frustrate the purposes of Section 4. This Court recognized in *McCready* that the two basic objectives of the private enforcement scheme embodied in Section 4 are deterrence and the desire to provide a remedy to injured persons who otherwise would be without recompense.[47] "Only by requiring violators to disgorge the 'fruits of their illegality' can the deterrent objectives of the antitrust laws be fully served."[48] In *McCready*, had the class of consumers which plaintiff represented not been granted standing, the funds which Blue Shield realized by means of its non-reimbursement policy might never have been subject to challenge. That is not the case here. Crocker has already settled a class action brought by customers of paper labels.[49] Similarly, unlike McCready,[50] respondent was not without remedy. Respondent's alleged injury—wrongful discharge—was remediable under state tort law.[51]

All told, it is inconceivable to think that one of Congress' objectives was to provide a remedy in the antitrust laws for wrongful discharge. This Court should grant certiorari

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[46]The Seventh Circuit in *Bichan* expressed the opinion that *only* persons "who, as consumers or competitors, suffer immediate injuries with respect to their business or property" should be permitted to impose the "deterrent sting" of treble antitrust damages. Slip Opinion at 11.

[47]50 U.S.L.W. at 4725 and n. 10.

[48]*Id.* at 4725 n. 10.

[49]*See* note 2 and accompanying text *supra*.

[50]"[I]n addition to allowing Blue Shield to retain a palpable profit as a result of its unlawful plan, denying standing to McCready and the class she represents would also result in the denial of compensation for injuries resulting from unlawful conduct." 50 U.S.L.W. at 4725 n. 10.

[51]*See* note 39 and accompanying text *supra*.

to place this case in contraposition with *McCready*, and define by way of example how the bar and bench are to identify which types of injuries are so tangential to the purposes of the antitrust laws that the persons who allegedly have suffered them will be denied *antitrust* standing.

III

THE COURT OF APPEALS DECISION IMPERMISSIBLY USES AN INFERENCE OF CONSPIRACY, IN LIEU OF EVIDENCE, TO REVERSE A PROPER GRANT OF SUMMARY JUDGMENT

The majority below held that a former employee may defeat a motion for summary judgment in an action for conspiracy to boycott his services under Section 4 of the Clayton Act *by relying solely on an unsupported inference of the likelihood of a boycott* drawn from the alleged existence of a price-fixing conspiracy in a product market. This decision is equally as troublesome as the majority's standing decision. The decision holds that in *every* case involving an alleged antitrust conspiracy there may be *inferred* a subsidiary conspiracy to boycott non-cooperating employees, and therefore that in response to a factual showing upon motion for summary judgment that no boycott exists, an employee need not present any evidence probative of the existence of the alleged boycott apart from evidence of an alleged conspiracy to fix prices.

This unsupported and sweeping decision is contrary to decisions of this Court and of other Courts of Appeals and has serious consequences for the judicial system as a whole. It effectively circumvents the question of whether a discharged employee has standing to challenge his employer's price-fixing conspiracy by allowing the employee to allege a subsidiary boycott of his services, the existence of which will then be *inferred* upon a defense motion for summary judgment. *The decision thus would permit any employee to go to trial on a subsidiary boycott claim merely by advancing evidence that his or her employer participated in a*

price-fixing conspiracy. The result, of course, is further encouragement of burdensome and expensive antitrust litigation by persons with at best fringe interests in the alleged substantive conspiracy, as demonstrated by the facts of this case.[22]

In support of its 1977 motion for summary judgment, Crocker made a comprehensive evidentiary showing that no conspiracy to boycott respondent's services had ever existed. Respondent himself admitted that he voluntarily resigned from his employment with Crocker in 1970 to accept a job in an unrelated field, and that he never applied for a position with any other label manufacturer. Deposition testimony from the appropriate executive officers of three of Crocker's alleged co-participants in the alleged boycott was filed in support of the motion for summary judgment; in each case they testified that had respondent applied for a job with the deponent's company, he would have received full consideration on the same basis as any other applicant, and that no boycott existed. In response to this extensive showing, respondent failed to produce any affidavits or other evidence of a conspiracy to boycott his services.[23] Accordingly, as required by Rule 56(e), an

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[22]This Court has previously expressed considerable concern that vexatious antitrust lawsuits not be encouraged. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) ("District Courts must be especially alert to identify frivolous claims brought to extort nuisance settlements."); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 478 (1962) (J. Harlan, dissenting) ("[H]aving regard for the special temptations that the statutory private antitrust remedy affords for the institution of vexatious litigation, and the inordinate amount of time that such cases sometimes demand of the trial courts, there is good reason for giving the summary judgment rule its full legitimate sweep in this field.").

[23]In an affidavit filed in 1975, respondent identified certain acts and statements in support of his claim that a price-fixing conspiracy existed among label manufacturers. These acts and statements are, however, of no avail to respondent on the claim on which he seeks relief: that there existed a *boycott aimed at respondent himself*, the object of which was to exclude him from employment. In response

experienced trial judge (now judge of the court of appeals) granted summary judgment in favor of Crocker with respect to the boycott claim.[54]

The majority below reversed, holding that if an employee puts forth some evidence that his employer was a participant in a price-fixing conspiracy, he need not come forward with *any* further evidence to overcome a motion for summary judgment on a claim that his employer was part of a conspiracy to boycott the services of employees who failed to cooperate in the price-fixing arrangement. The stated reason for this result was the majority view that the trier of fact should, if it so chooses, be permitted to find that such a boycott existed on the basis of a "reasonable inference."[55] Crocker respectfully submits, however, that the leap from evidence that a defendant participated in a price-fixing conspiracy to the conclusion that a second conspiracy to boycott non-cooperating employees existed is sheer speculation insufficient to raise a triable issue of fact. The "inference" suggested by the majority below cannot substitute for evidence required to overcome a motion for summary judgment.[56] As Judge Kennedy said in dissent below, "An unsupported inference of a boycott is not sufficient."[57]

The decision below is squarely at odds with this Court's holding in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) that once the allegations of

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to the 1977 motion for summary judgment, respondent put forward no affidavits and identified no specific acts, statements or facts supporting his claim of the existence of this boycott, essentially conceding that his claim rested on assumption and conjecture. *See* notes 12-13 *supra*.

[54]The Honorable Cecil F. Poole, U.S. Court of Appeals for the Ninth Circuit. *See* note 13 *supra*.

[55]Appendix A at 25.

[56]This Court has stated, "Speculation cannot supply the place of proof." *Moore v. Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 578 (1951).

[57]Appendix A at 45.

conspiracy made in an antitrust complaint are rebutted by evidence of the non-existence of the conspiracy, summary judgment for defendant should be granted unless plaintiff comes forth with *significant probative evidence* tending to support the claim. A *factual* showing is what is required, not mere speculation. Fed. R. Civ. P. 56(e).

Decisions of this and other courts have made it clear that proof of one antitrust conspiracy is not sufficient to support the existence of another conspiracy. *Theatre Enterprises, Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537, 543-44 (1954); *Golf City, Inc. v. Wilson Sporting Goods Co., Inc.*, 555 F.2d 426, 435 (5th Cir. 1977).[58] If an inference of an antitrust conspiracy is to be drawn at all, it must *start* with evidence of *consciously parallel conduct* probative of the conspiracy. *See American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).[59]

There is no dispute that, on the record in this case, there has been absolutely no showing of parallel conduct with respect to respondent's employment by any of the alleged co-conspirators. By allowing an unsupported inference of boycott with no evidence of parallel conduct, the majority below has not only undermined the substantive law dealing with the inference of conspiracy but, in essence, made Rule 56 of the Federal Rules of Civil Procedure inapplicable to this type of case. The decision thus creates yet another conflict with decisions of other courts of appeals which have followed *Cities Service* and denied antitrust plaintiffs the right to proceed to trial where the defen-

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[58] *See also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1101 (E.D. Pa. 1981).

[59] Recent circuit court decisions discussing the inference of conspiracy all begin their inquiry with demonstrated parallel business behavior. *See Tose v. First Pennsylvania Bank*, 648 F.2d 879, 894 (3d Cir.), *cert. denied*, 102 S.Ct. 390 (1981); *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1610 (1982).

dant's evidentiary showing was countered by no more than speculative or circumstantial evidence.[40] Accordingly, this Court should grant the writ of certiorari to vacate the decision of the court of appeals and make clear the continuing authority of *Cities Service* that antitrust plaintiffs who allege a boycott of their services must come forward on motion for summary judgment with more than mere conjecture to support their allegations.

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[40]*See, e.g., Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d at 462 (7th Cir. 1981) (affirming grant of summary judgment in a price-fixing suit where after years of discovery plaintiffs had produced no evidence affirmatively supporting their theory; in light of the defendants' showing by way of affidavit and deposition, the court of appeals ruled that plaintiffs could not rely on circumstantial evidence to create an inference of conspiracy). *See also Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 839-40 (2d Cir. 1980); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1080 (3d Cir. 1978); *Tripoli Co. v. Wella Corp.*, 425 F. 2d 932, 935-36 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970); *Natrona Service, Inc. v. Continental Oil Co.*, 598 F.2d 1294 (10th Cir. 1979).

CONCLUSION

For the foregoing reasons, Crocker respectfully submits that the petition for certiorari should be granted.

Dated: August 2, 1982

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